/LVS

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 11 December 2008

CASE NO: A692/07

In the matter between:

PETROS BONGANI MCHUNU **APPELLANT**

vs.

THE STATE **RESPONDENT**

JUDGMENT

BOTHA J:

The appellant appeals against his conviction and sentence.

He was convicted of murder and sentenced to 20 years imprisonment of which 10 years were suspended on certain conditions for five years.

The appellant was convicted in the Regional Court. After conviction the matter was referred to the High Court for sentence in terms of section 52 of Act 105 of 1977.

The appellant was charged with murder on the basis that on 21 May 2003, he killed Johan Daniël Boshoff by knocking him with a motor vehicle. There were alternative charges of culpable homicide and reckless or negligent driving.

The appellant, who was represented, pleaded guilty of murder. The appellant's attorney offered the following plea explanation:

> **"Accused admits that on the 21 May 2003 at or near Benoni which is in the regional division of Southern-Transvaal. He did unlawfully and intentionally kill Johan Daniël Boshof, a male person by knocking him with a motor vehicle to wit a Toyota mini-bus bearing registration numbers HLF 206 GP. Accused admits that**

at the time of the offence he was aware that this conduct was unlawful and punishable by law. Accused admits that while so driving his conduct would result in knocking down of a person who could die as a result thereof.

Accused admits that the body of the deceased was properly identified and was transported after it was properly sealed by the relevant authorities. Further accused admits that during the transportation of the said body it did not suffer any additional injuries other than those that were caused as a result of the driving of his motor vehicle. Accused admits that the post mortem report was properly conducted. Accused states that he made the statement freely and voluntarily. Accordingly accused pleads guilty and the statement is dated on this the 5 November 2003. It has not been signed your worship subject to confirmation of the contents by the accused."

The appellant confirmed the correctness of the plea explanation.

When the regional magistrate asked a further clarification of the explanation, the following was supplied by way of addendum:

> **"Accused states that whilst he was driving the motor vehicle to wit the Toyota mini-bus bearing registration numbers HLF 206 GP, the deceased, a traffic officer entered the middle of the road along which he was driving well in advance, which could have given him that is the accused, enough time to stop the motor vehicle without knocking down the said traffic officer that is the deceased. That is the addendum your worship."**

The court then found the appellant guilty of murder.

The previous convictions were proved against the appellant. The following facts were placed before the court in mitigation:

(a) that the appellant was 23 years old;

(b) that he was married and had two children;

(c) that he was a taxi driver earning R250.00 per week;

(d) that he had not planned to kill someone;

(e) that he was remorseful and

(f) that he left school in grade 1.

The state called a traffic officer, Mr Hunt. He testified that he was in the company of the deceased when he died.

He pointed out that the deceased was wearing his full uniform with protective clothing which included reflectors. It was a straight road. As he put it, it looked like Christmas, the way cars were flashing their lights at oncoming vehicles.

After argument the regional magistrate decided to refer the matter to the High Court for sentence.

On 22 April 2004 the appellant appeared before Kruger AJ.

Counsel on behalf of the appellant had no objection against the confirmation of the conviction. It was then duly confirmed.

The court referred to what it was told by the appellant's counsel, namely that there was ample time to react when the deceased stepped into the road, that the appellant was driving fast, that his brakes were not working properly, that he tried to swerve, that he realized that his vehicle might capsize, that he was

afraid to react to the deceased's signal and stop because he was afraid that he would be given a fine for not having a taxi permit.

The court found that substantial and compelling circumstances justifying a lesser sentence than life imprisonment were present. He referred to the fact that the appellant made a split second decision on the spur of the moment, the fact that intent took the form of dolus eventualis and the remorse shown by the appellant.

The court then imposed the sentence of 20 years imprisonment of which one half was suspended.

On all the facts tendered in explanation of the plea the conviction was entirely appropriate. The correctness of the conviction was not questioned when the court had to decide whether the conviction should be confirmed.

It was argued on behalf of the appellant that a defence was disclosed to the judge *a quo* when he was addressed on sentence, the defence being that the appellant's brakes were not working properly. It was argued that the court should have entered a plea

of not guilty in terms of section 113(1) of Act 51 of 1977. It was also argued that because the court accepted that version as the basis of finding that substantial and compelling circumstances justifying a lesser sentence were present, it should have found the appellant guilty of culpable homicide.

In my view the allegation that the brakes were not working properly was not submitted as a defence. It was submitted as one of several circumstances that led to the appellant deciding on the spur of the moment not the react to the signal of the deceased. It must be read in context. I quote from page 44:

> **"According to what Mr Ramasodi, appearing on behalf of the accused, told me this morning the deceased stepped from the left hand side of the accused as the accused was driving his vehicle. There was according to the accused's admission ample time to react as he saw the deceased stepping onto the road surface. From what I was told this morning the accused says that he was driving fast, but that the brakes of his vehicle were not working properly, that he tried to swerve but realised that his vehicle might capsize. He then hit the deceased on the left hand side of the vehicle he was driving. The**

reason he was afraid to stop and to react to the signal given by the deceased was that he was afraid he will be given a fine for not having a permit, that is a taxi driver's permit."

In my view it is clear that the basis of the plea explanation, namely that there was enough time to react, remained unaffected. The court *a quo* took into account his explanation to find that the crime was not premeditated.

Accordingly there is no reason to interfere with the conviction.

All that remains is the question of the sentence. Life imprisonment was mandatory because the deceased was a law enforcement officer performing his functions.

The court a quo's finding that substantial and compelling circumstances justifying a lesser sentence were present, must be accepted.

I have a problem with the fact that a suspended sentence was effectively added onto a long period of imprisonment.

One cannot help to wonder whether the court did not try to make the sentence look more severe than it was.

In general it is inappropriate to add a long term of suspended imprisonment to a long term of effective imprisonment. See **S v Abrahams 1996(1) SACR 571 A at 571 f-g** and **S v Mhlakaza 1997(1) SACR 515 SCA at 524 a-b**. In **S v Wakiri 1981(2) SA 527 AD at 530 G-H** it was said that what was needed after a long period of imprisonment was a comparatively short period of suspension to induce the released offender to settle down to a useful life.

On the assumption that the suspended portion of the sentence has to be undergone (see **S v Setnoboko 1981(3) SA 5530 at 556 E-F**), I am of the view that a sentence of 20 years imprisonment would be excessive in the circumstances.

The appellant had spent a year in custody awaiting trial. He was a first offender. His conduct was not premeditated. He made

a disastrous decision in a fraction of a second under the circumstance where he did not have the direct intent to kill, but where the death of the deceased clearly was a possible outcome.

In all the circumstances I am of the view that a sentence of 12 years imprisonment of which two years are suspended would be an adequate sentence.

Any lesser sentence would not be adequately reflect the seriousness of the offence.

In the circumstances the following order is made:

1. **The appeal against the conviction is dismissed.**
2. **The appeal against the sentence succeeds. The sentence imposed by the court a quo is set aside and the following sentence is substituted for it:**

   "Twelve years imprisonment of which two years are suspended for three years on condition that the accused is not convicted of murder or attempted murder committed during the period of suspension."
3. **This sentence is antedated to 22 April 2004.**

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C. BOTHA

JUDGE OF THE HIGH COURT

I agree

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K MAKHAFOLA

ACTING JUDGE OF THE HIGH COURT

I agree

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S.P MOTHLE

ACTING JUDGE OF THE HIGH COURT